

No. 3004.

---

IN THE  
**United States Circuit Court of Appeals**  
FOR THE  
NINTH CIRCUIT

---

THE SIMPLEX WINDOW COMPANY, a Corporation,  
Appellant,  
vs.

HAUSER REVERSIBLE WINDOW COMPANY, a Corporation, FRED HAUSER and JESSIE HAUSER,  
Appellees.

---

**PETITION FOR REHEARING**

---

SCRIVNER & HETTMAN,  
Attorneys for Defendants.

---

Filed this.....day of March, A. D. 1918.  
F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

---

The James H. Barry Co., San Francisco.

FILED  
MAR 5 - 1918  
F. D. MONCKTON.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

THE SIMPLEX WINDOW COM- PANY, a Corporation,  vs.  HAUSER REVERSIBLE WINDOW COMPANY, a Corporation, FRED HAUSER and JESSIE HAUSER,  <i>Appellants,</i>	}	No. 3004
---	---	----------

*Appellees.*

---

PETITION FOR REHEARING.

*To the Honorable the Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

Now come the defendants and appellees, Hauser Reversible Window Company, et al., and believing and therefore respectfully representing that the Court has been led to an erroneous conclusion in its decision entered and filed herein on the 11th day of February, 1918, by inadvertently overlooking and misapprehending the actual construction and operation of the re-

spective devices of the appellants and appellees, and in not applying the proper limitations to the claims of the appellant's patent sued upon herein, and in holding that the claims of the appellant's patent were entitled to a broad application of the doctrine of equivalents, and for other errors appearing in the said opinion of the Court, and file their petition for a rehearing for the purpose of having the record again considered.

The petitioners respectfully pray that the cause may be restored to the calendar for a rehearing and may be reheard upon oral arguments and printed briefs in order that injustice may not be done.

Respectfully submitted.

HAUSER REVERSIBLE WINDOW

CO., ET AL.,

Defendants and Appellees.

By SCRIVNER & HETTMAN,

Their Counsel.

I hereby certify that in my judgment the above petition for rehearing is well founded in point of law, is not interposed for purposes of delay, and ought to be granted.

J. J. SCRIVNER,

Attorney for Appellees.

## BRIEF ON PETITION FOR REHEARING.

On page "4" of the typewritten copy of the opinion rendered herein, the Court said:

"One thing is manifest from that portion of the specification above quoted, which is, that the Soule invention was but an improved window of the character therein specified, namely: 'windows of the swinging, reversible type'; for such is the inventor's express declaration. There is, therefore, no ground for the appellant's contention that reversible windows were new before the Soule invention."

And, on page "7" of said opinion the Court further said:

"As we understand the Soule device, it is an automatically operating one for holding the window in any desired position, and while his patent cannot, in our opinion, be properly regarded as a pioneer one in any sense, we think the improvement invented by the appellant's assignor marks such a distinct advance in the art over anything theretofore existing, so far as has been shown, as entitles the patent to the protection of the doctrine of equivalency in proportion to such advance";

And, on page "8" of said opinion, in an effort to compare the Soule device with the Hauser device, the Court said:

"each has an adjuster arm, a carrier arm, and a sliding mechanism in connection therewith by which the same result is attained—the chief difference being that in the Soule device the lower end of the adjuster arm is slidably pivoted in the

window frame and its outer end rigidly pivoted therein, whereas in the Hauser device the lower end of the adjuster arm is rigidly pivoted in the window frame, *and its upper end slidably pivoted in the window sash by means of the link numbered 19.* In other words, in the one, the sliding mechanism is located in the window frame, and in the other in the window sash."

From these and other expressions in the opinion, we are led to believe that the Court did not fully comprehend the structure or mode of operation involved in the two devices. It may be that we were at fault in not giving a more detailed description of the construction of these two devices, for they are certainly radically different.

In all the preliminary paragraphs which describe in general terms the nature of the Soule invention, the inventor speaks of carrier arms as being an essential part of his invention. These carrier arms numbered "4" in his drawing are pivoted in the upper end to plates secured to the sides of the window frame and hang downwardly therefrom. From the lower ends of these carrier arms are suspended pivoted adjuster arms "7," one end of each of which slides in a groove in the window frame, while the other end is fixedly pivoted to a side of the window sash.

Now, as contradistinguished from this structure, the Hauser structure appears to us to be entirely different, for it clearly appears that the sash is *supported*, not *suspended* upon the upper ends of arms which extend upwardly and are supported at their lower ends

to sides of the window frame, the upper ends of said arms being fixedly pivoted to the window sash. The other arm of the Hauser device, if you will call it an arm (Hauser calls it a link "19"), instead of being pivoted to the supporting arms at points intermediate of the ends, as are the adjusting arms of Soule, but are pivoted thereto at their lower ends, and at the upper ends can slide in grooves in the sides of the window sash.

Thus, it will be seen that there are several important structural differences between the Soule device and the Hauser device, to-wit:

(1) In the Soule device, the sash is connected to the window frame by a *double* folding connection, *the adjuster arms* and *the carrier arms*; while, in the Hauser device the sash is connected to the window frame solely by *one* arm, namely arm "24";

(2) The center of the Soule sash is always *below* the support on the window frame; while that of Hauser is always *above*;

(3) The Soule device has three parts engaging each side of the window frame, to-wit: the sash, arm "4", and arm "7"; while the Hauser has only two parts engaging the window frame, to-wit: *the sash, and arm "24"*;

(4) The Soule has two parts slidable in grooves in the window frame, to-wit: "12" and "16"; the Hauser has only one, to-wit: the block "3" at the upper end of the sash.

From this concrete analysis of the structure it must be apparent that the construction of the two devices is radically different.

In our opinion it would be very unusual if structures so wholly different in their details of construction should operate in the same way, although they produced the same common results. Of course, we need not stop to call the attention of the Court to the well known rule of law, that patents are granted for the structure, the mechanism or elements which, in combination with each other, produce a result, and not for the results or the mode of operation. In other words: in the case at bar, while the common results are substantially the same, such a vast difference in the structure and the combination of devices making them up, would almost necessarily lead to a different mode of operation. This is especially so, when it is conceded that the art of swinging reversible window frames is an old art and that both Soule and Hauser are mere improvers in the same old art.

The frictional resistance in the Soule device which holds the window in any desired position is at the top part of the frame, where the upper end of the sash is provided with a device for the purpose of obtaining frictional resistance (see Mr. Miller's brief near middle page 15). While in the Hauser device the only frictional resistance which holds the window in any desired position is the frictional devices controlling the movement and action of arm "19," and in the Hauser device the upper end of the sash is only slidably connected with the sash without any frictional resistance (see Hauser patent, col. 2, page 1, folio 80). In other words, Soule holds his sash in



any desired position by means of the frictional device arranged in the upper end of his sash and connected by suitable means to the frame; Hauser holds his sash in any given position by means of frictional contact of one end of arm "19" with the sash, as shown at folio 85, second column, page 1 of the Hauser patent, and figures 18, 21 and 22, Fig. 1 of the drawings. We urge that there is a wide distinction between having the sash slidably and frictionally pivoted in the frame to hold the sash in any desired position, as in Soule, and having the carrier arm or link "19" of the Hauser frictionally and slidably attached to the side of the sash itself to accomplish the same function; that is, holding the sash in any desired position. This very difference in construction we insist necessarily involves a clear and well defined difference in the mode of operation of the two devices.

At this point we desire to respectfully call the attention of the Court to a statement in the opinion, where it is said:

"The chief difference being that in the Soule device the lower end of the adjuster arm is slidably pivoted in the window frame and the outer end rigidly pivoted *therein*. Whereas, in the Hauser device the lower end of the device is rigidly pivoted in the window frame and the upper end slidably pivoted in the window sash by means of the link 19."

With all due respect to the Court, we must insist that so far as the statement attempts to describe the

construction and operation of the adjuster arm "24" in the Hauser device, it is in our opinion fatally erroneous. There are several minor objections to this statement to which we will simply call the attention of the Court before we take up the serious and, as we think, fatal one.

We are at a loss to understand what the Court meant, in speaking of the Soule device, by the expression:

"The lower end of the adjuster arm is slidably pivoted in the window frame and its outer end rigidly pivoted therein."

If the word "therein" means that the outer end of the arm was pivoted in the window frame, of course it is meaningless, for it would be impossible to pivot both ends of the arm in the window frame. Then, again we object to the use of the word "rigidly," as being incorrect: none of these arms are pivoted rigidly at any point; if they were, they could not move in any direction; they are simply fixedly pivoted so they can swing from a fixed point like the pendulum of a clock. The fatal objection to this statement, however, rests in the expression (in speaking of the Hauser device) that the lower end of the device (presumably meaning the arm "24") is rigidly pivoted in the window frame and the upper end slidably pivoted in the window sash. With all due respect to the Court, we must insist that, so far as this statement attempts to describe the construction and operation of the adjuster arm

"24" in the Hauser device, it is fatally erroneous. It is true that the lower end of the adjuster arm "24" of the Hauser device is fixedly (not rigidly) pivoted in the window frame, but it is not true that the upper end is slidably pivoted in the window sash, with anything, or by any means whatever, or at all. The upper end of this arm does not slide in any direction or for any purpose. It would be fatal to the operation of the Hauser device if the upper end of his arm "24" would slide in any direction. It swings exactly as the upper end of the Soule arm "7" and exactly as the arm "16" in the Soule-Larsen patent.

If the Court will take the trouble to look at the Soule-Larsen patent, on pages 90 and 91 of the transcript, it will be readily seen that arm "16" of this device is the precise counterpart in structure and in its means and method of attachment to the frame and sash, and its functions and mode of operation are precisely the same as the arm "24" of the Hauser patent; that is to say, one end of the Hauser arm "24" is fixedly attached to the frame and the other or upper end fixedly, not slidably, pivoted to the sash, as at figure 26 in the drawings, and in the Hauser patent at fol. 70, where it is said (referring to this arm):

"of which the lower end is pivoted, as shown at 26, to the lower end of the slotted portion of the bar 8."

It is difficult for us to understand how the Court could have gotten the idea that the upper end of the Hauser arm "24" was in any sense, or for any purpose,

slidably attached to the sash. If the Court will only look at the drawings and reflect for one moment, it will be clearly seen that such a construction would be absolutely inoperative. With arm "19" sliding at the upper end and the upper end of the arm "24" sliding in the same direction, what could result from such an operation? A complete collapse. Certainly the arm "19" could not perform the function called for in the specifications of the patent, where it is said, at folio 65:

"The ends of said spring 21 bear against the under side of the flat bar 8 and create sufficient friction thereagainst, to prevent the window sash moving from any position to which it has been turned. The other end of said link is pivoted, as shown at 23, to a mediate point of an arm 24, of which one end is pivoted, as shown at 26, to the lower end of the slotted portion of the bar 8, etc."

It is indeed absolutely necessary that the upper end of the arm "24" of the Hauser device be fixedly pivoted to the sash, in order that the lower end of arm "19" have something to hold its lower end in a fixed position, in order to hold the sash in any desired position.

It seems to us that this is so apparent that it ought not to require any argument to demonstrate it. Neither Mr. Soule, nor his counsel, attempt to make any such contention.

Mr. Miller filed two briefs in the case, and in neither did he make any such a contention as that the upper end of arm "24" of the Hauser device was slidably attached to the sash in any manner. The

Court will find Mr. Miller's views on this subject in his Opening Brief, on page 17. On page 19 thereof, near the middle, he says:

"Now in the Hauser structure the lower end of the adjuster arm does not slide in the groove of the window frame, but is fixedly pivoted there, and in order to compensate for this the sliding mechanism has been transferred to a groove in the window sash, in which the end of the carrier arm slides."

This is, undoubtedly, correct so far as the slidability of the Hauser carrier arm "19" and the non-slidability of the upper end of the Hauser adjuster arm "24" is concerned. The same statement appears on page 20 of said brief, near the top thereof.

If it were true that the upper end of the Hauser adjuster arm "24" was slidably pivoted to the sash, then there would appear to be a mere change of the location of the slidable function of the arm "7" of the Soule device from one end to the other, and we are not prepared to say that the doctrine of equivalents would not apply to such a mere change of location of the important function of the arm "7" from one end to the other. In other words, if you fixedly pivot the lower end of arm "7" of the Soule patent with the frame and slidably pivot the upper end of the Soule arm "7" to the sash you would have a device operating in the same way; that is, it would make no difference whether the arm "7" of the Soule device was slidably pivoted to the sash or to the frame, but that

is not the question here, and it makes a vast difference in the mode of operation of the two devices.

Again, on the last page of the opinion the Court seems to come to the conclusion that, because there were two arms in each case and each case possessed the function of slidability of an arm at some point, they were the equivalents of each other. The Court seems to have ignored the important feature of the frictional connection of the sash with the frame. Without frictional connection of some kind both of the devices would be wholly inoperative and useless. Soule's frictional connection of the sash with the frame is at the top end of the sash, as hereinbefore explained, while Hauser's sash has no frictional connection with the frame at all. Hauser's sash carries its own frictional device irrespective of the frame, which is at the upper end of the arm "19." It is true this link arm "19" is also at the same time slidable in the groove where the frictional devices are located.

We urge that this should not be considered as a mere change of location; the location of the frictional devices have been changed and that of itself materially affects the operation of the devices. The location of frictional devices at the upper end of the sash is not claimed to be new by Soule. The location of the frictional devices in the Hauser patent, in the manner above described, is an element of each of his claims, and without this frictional element in the Hauser patent it would be wholly inoperative. We urge that this of itself marks important divergence

between these two devices; they are not the same structures and the claims of the plaintiff's patent can not be read upon the Hauser device.

#### CLAIMS.

It is conceded on all sides that the claims of the patent sued on are combination claims for a device in an old art, and that all of the elements are old in fact as well as in law, and the same of course may be said of the Hauser patent.

We urge that the Court has not applied to the construction of the Soule claims the limitations which the patent laws require in such cases. It is a familiar rule that a claim must precisely define the exact limitation of the invention claimed, also "that the specification, claims and drawings of the patent are a unit; whatever parts of the device are named in a claim are of necessity intended to be named with reference to the specifications and drawings, etc.":

*Houser vs. Starr* (203 Fed., page 264).

If we understand what is meant by the authorities upon the limitation of claims in inventions covered by combinations, it is that: where an inventor in his specifications and in his claims particularly describes and points out how, where or when a given element should be located to perform a given function, then his claim is so limited, and he is not entitled to go beyond that limitation. Each of these claims is limited so far as the respective arms are concerned;



that is, the adjuster arms must have one end fixedly pivoted at points slightly above the middle of the sash, and the other end slidably pivoted in the frame; carrier arms, one end must be fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm. Unless one end of the adjuster arm is slidably pivoted to the frame, it is not the specific device so carefully described in the specification, and unless the carrier arm is fixedly pivoted at both ends, one end to the frame and the other to the adjuster arm, it is not the invention described in the specification and claims. Further, that the doctrine of equivalents applies only to the individual elements of the combination claimed and not to the whole machine made up of these individual elements. That is to say (as was said by the Supreme Court in *Westinghouse vs. Boden Power Brake Company*, 170 U. S., 42; Law Ed., p. 1136):

“The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term ‘equivalent.’”

Again:

“A mechanical equivalent must be adaptable to use as a substitute for something else, and competent to perform the functions of a particular device for which it may be substituted.”

*Alaska Packers' Association vs. Letson* (119 Fed. Rep., page 599).



The case of *Arnold-Creager Company vs. Barkwill Brick Company*, reported in the 246 Fed. Advance Sheet of February 7th, 1918, No. 4, page 441, very aptly illustrates our contention in this matter. On page 444 the Court said:

"Assuming that the defendant's device did infringe the claim, in the absence of express limitation therein, yet if the inventor has so limited it he is bound by that limitation, notwithstanding it was voluntarily made. . . . Notwithstanding the specific mention of the *pug shaft* in the first and third claims, we are of the opinion that the inventor has intentionally limited claim 2, at least to the connection of the crank to the pug shaft upon the *front end of the mill*. . . . In a broad sense, and for many purposes, the sides of the charging chamber is the perfect equivalent of the end of that chamber. It may be that Arnold would have been entitled to a claim like claim 2, with 'discharge face' substituted for 'front end'; and if the use of the phrase 'front end' indicated only Arnold's intent to name the location that happened to be the appropriate one in the machine before him for his platen and plunger mechanism, it might well be that the defendant's side location would be its equivalent. However, as we have pointed out, the front end location was not a matter of mere form. The degree of direct communication and of simplicity which Arnold thought to characterize his invention demanded that the location should be on that face through which the pug shaft projected; and when it thus appears that the word of limitation represented a *thought essential* to that which the inventor regarded as his new step, its limiting effect cannot be neutralized through the rule of equivalency."

This case was for the infringement of a brick machine, employing the horizontal pug mill and shaft, etc., and after mentioning several elements the claim specifically mentions a press platen consisting of a *crank mounted on the front end of the pug mill*, and a controversy arose over the construction to be given to this element; that is, whether the plaintiff was limited to a platen consisting of a crank mounted on the front end of the pug mill, and the Court held that he was.

Commencing near the bottom of page 443 and down to the middle of page 444, will be found a description of the two machines, where it will also be found that the only point of controversy was whether the defendant infringed by locating the platen on one side of the pug mill.

In *McClain vs. Ortmyer* (141 U. S., page 425), the Supreme Court said:

“The claim is the measure of the patentee’s right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.”

Again, in the same case the Court said:

“It is true that, in a case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention; but if the language of the specification and claim shows clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not

fall within the terms the patentee has himself chosen to express his invention."

Citing:

*Vance vs. Campbell* (66 U. S., 1 Black, 427):

"that, where a patentee declares upon a combination of elements which he asserts constitute the novelty of his invention, he cannot in his proofs abandon a part of such combination and maintain his claim to the rest."

In the case of *Cimiotti Unhairing Co. vs. American Fur Ref. Co.* (198 U. S., p. 399; 49 Law Ed., p. 1100), on page 1105 of the said law edition the Court said:

"In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof."

Citing numerous cases.

We contend that these cases are especially applicable to the case at bar.

Soule limits the construction of his arm "7" by making it slidably pivoted at the bottom end and fixedly pivoted at the upper end. That was his idea, as clearly shown by his specification. Now we say that

an arm fixedly pivoted at both ends is not the equivalent of an arm fixedly pivoted at one end and slidably pivoted at the other end; they do not and cannot perform the same function; and, applying the law of equivalents to the respective elements of the plaintiff's claims the same conclusion is necessarily reached. Element "4" of the plaintiff's device is fixedly pivoted at both ends—one end to the sash and the other to the arm "7," while in the defendant's device the arm or link "19" is not pivoted to the frame at all, but is *frictionally* and slidably pivoted at one end to the sash and fixedly pivoted at the other end to the arm "24."

Now, it seems to us going entirely too far to say that these two arms (that is arm "4" of the Soule and arm "19" of Hauser) perform the same function, or that they are in any sense the equivalent of each other. It seems to us that a glance at the specification of these two patents must show that they do not perform the same functions, nor do they perform any function in substantially the same way. Arm "4" of Soule was introduced for the purpose of maintaining the general equilibrium of the whole device, etc., as will be seen at folio 100. In order to do that, it was necessary that the lower end should be fixedly pivoted somewhere near the middle of the arm "7," as will be seen at folios 60, 65 and 70 of the Soule patent; while on the other hand the function of arm "19" of the Hauser construction is "to create sufficient friction there-against, to prevent the window sash moving from any

position to which it has been turned." This is not the function of arm "4" of Soule's, as we have already mentioned the friction in the Soule patent, which prevents the window sash moving from any position to which it has been turned is at the top of the window sash and frame, as before stated. So, that the function of arm "19" of the Hauser device is the same as the frictional connections between the sash and the frame of the Soule device, and not the function or functions of arm "4"; none of Soule's arms have any frictional connection of any kind, and this very fact of having arm "19" in Hauser performing the function of restraining or controlling the action of the sash, it seems to us clearly and distinctly marks the distinction and principle of operation of the two devices.

To state it in another form: the arm "19" of Hauser with its frictional connection to the sash creates sufficient friction to prevent the window sash *from moving from any position to which it has been turned*. You will note that the sash is already moved or turned before this frictional arm or link "19" performs its function. It has nothing to do with securing the general equilibrium desired, as in arm "4" of Soule, nor allowing the window to be readily shifted from one position to another; you can shift it from one position to another just as well without it as with it, and do it just as readily. These different functions of these two mentioned arms are made necessary on account of the fact that in Soule's device the upper

end of the sash is only slidably connected to the frame and it is evident that it would collapse if it was not for the arm "4." While, in Hauser's device the sash is only frictionally but not slidably pivoted to the frame, and it is evident that for this reason it became necessary to have the frictional and slidable arm "19," which does not and cannot perform the functions of arm "4" of Soule, and without which Hauser's device would collapse.

Reverting again to the fact that it is ~~desired~~ <sup>conceded</sup> that these inventions are not pioneers, but both improvements in an old art, we think the Court has not applied the rules applicable to such cases.

The case of *McCormick vs. Talcott* (20 How., 402) states the rule in such cases which has been followed ever since and probably cited oftener than any other case in the books. For convenience, we will quote from it:

"In order to ascertain whether the divider used by defendants infringes that of the complainant, we must first inquire whether McCormick was the first to invent the machine called a divider, performing the functions required, or has merely improved a known machine by some peculiar combination of mechanical devices which perform the same functions in a better manner.

"If he be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing ma-

chine may be an improvement of the original, and patentable as such. *But, if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions.* The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

In the case of *Railway Co. vs. Sayles* (97 U. S., 554) this rule has been commented upon and stated in various forms in many later decisions. As we understand this rule it simply means: that where two inventors are mere improvers in an old art one cannot claim the other to be an infringer on the ground of equivalents, unless his devices are mere colorable invasions of the first, and we cannot see how this can be said of the Hauser devices. To say, that they are mere colorable invasions of the Soule device would seem to us to be clearly erroneous.

Again, in the said case of *Railway Co. vs. Sayles*, the rule is stated in a modified form as follows:

"If one inventor, in a particular art, precedes all the rest, and strikes out something which underlies all that they produce, he subjects them to tribute. But if the advance towards the thing desired is gradual, so that no one can claim the complete whole, then each inventor is entitled to the specific form of device which he produced,



and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors and does not include theirs."

Another well established rule of construction in such cases is stated as follows:

"Where a combination patent accomplishes no new result in mechanics and differs from previous known combinations only in its construction in one or more of its parts, whereby, *perhaps, a better but not a different kind of result is accomplished, than had been effected, it must be limited to those details of construction*":

*Phoenix Caster Company vs. Spiegel* (26 Fed. Rep., page 274).

As we read these decisions, it seems that the Court must have held:

(1) That the non-slidable adjuster arm of Hauser was the equivalent of the slidable and fixedly pivoted adjuster arm of Soule, and that the frictionally, slidably adjuster arm "19" of Hauser was the equivalent of the non-frictional, non-slidable carrier arm of Soule, and the sliding mechanism in each, absolutely regardless of the construction, mode of attachment, operation and connection of these devices; or

(2) That because each of them had an adjuster arm of any kind, and a carrier arm of any kind, that therefore—taking the Hauser device as a whole—it



was the equivalent of the Soule device as a whole, because they accomplished the same result.

As was said in *Westinghouse vs. Boyden Power Brake Co.* (170 U. S., 557):

“The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose, is a flagrant abuse of the term ‘equivalent’.”

In the case of *Dresner vs. Diamond* (239 Fed. Rep., page 882), it was said:

“Infringement of a patent for a combination of old elements must be predicated on an appropriation of the same elements or their equivalents in the same combination.”

The words “the same combination” here mean in the same arrangement and in substantially the same structural relations of the elements of the combinations to each other.

It may be that we have made this brief unnecessarily long and gone too far into details, but our excuse for so doing is due to the fact that we feel the Court has unintentionally overlooked many of the controlling features involved, and that injustice has been done to the defendants. While it may seem that these inventions are small matters, yet they are quite

important, as the defendants have built up quite a trade under their own patents and rely upon the same for the support of the patentee, Hauser, and his family.

All of which is respectfully submitted.

SCRIVNER & HETTMAN,  
Attorneys for Defendants.

*JH.*